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IN THE

Supreme Court of the United States

October Term, 1968

No. 519

MARVIN HAYUTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that this Court grant rehearing of its order of November 25, 1968, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above case, as prayed for in the petition filed herein on September 13, 1968.

The ground for this petition for rehearing is that subsequent to the filing of the petition for a writ of certiorari, this Court granted certiorari in *Cardinale* v. *Louisiana* (No. 76, November 25, 1968), a case raising an issue very similar to one herein. For examples of orders issued on such basis, see *Goldbaum* v. *United States, Banks* v. *United States,* and *McFee* v. *United States,* reported at 347 U.S. 1007 (1954) and 348 U.S. 905 (1955). In these cases, earlier orders denying certiorari were first vacated (347 U.S. 1007). Subsequently, certiorari was granted and the cases were remanded for reconsideration in the light of intervening decisions of this Court (348 U.S. 905). The intervening decisions had all *affirmed* convictions, but in so doing had

laid down important principles. This Court, remanding in *Goldbaum, Banks* and *McFee* (and six other cases), said that

> ". . . re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down . . ." 348 U.S. 905, 906.

Reasons for Granting Rehearing and Issuing the Writ

The propriety of the suggestion of Petitioner's prior criminality during the prosecutor's cross-examination of certain witnesses was questioned in the original petition herein (pp. 21-23). The suggestive questions asked by the prosecutor are set forth at pp. 9-10. Petitioner had suffered no previous convictions, indictments, or arrests, and thus the prosecutor could not, and did not, make any direct statement to that effect in his questioning. Compare *Michelson* v. *United States,* 335 U.S. 469 (1948); *United States* v. *Wolfson,* 66 Cr. 720 (U.S.D.C., S.D.N.Y.), appeal pending (2d Cir., Dkt. No. 31993).

Bereft of such weapons, the prosecutor put a series of questions designed to suggest to the jury that Petitioner was the constant companion of known criminals, indeed of persons convicted of crimes similar to those of which Petitioner himself was then accused, although such questions had no legitimate purpose and specifically no rationable bearing on the question of Petitioner's reputation for veracity.

Thus the prosecutor twice observed that in 1964 Petitioner "was promoting a company . . . with one Alfred Lawrence, a man who had been convicted" of securities fraud a year earlier (petition, p. 9). He also stated repeatedly that Petitioner had been a "business associate" of another man who had been convicted of securities fraud (petition, p. 10).

In the original petition, while we pointed to the enormous prejudice to Petitioner of such innuendo (p. 22), we concentrated on demonstrating the conflict between the view of the Court of Appeals below, on the one hand, and the view taken by the Court of Appeals for the District of Columbia, on the other, regarding the permissible scope of cross-examination of "character" witnesses. See, e.g., *Shimon* v. *United States,* 352 F.2d 449, 454 (D.C. Cir. 1965).

We wish now to point out that this Court has recently granted certiorari in *Cardinale* v. *Louisiana* (No. 76, November 25, 1968), a case which raises a very similar issue. In *Cardinale,* the petitioner, in the course of confessing to the crime of murder, referred to a prior unrelated crime of which he had been convicted. The Louisiana Courts held that a state statute permitted the prosecutor to read the entire confession to the jury without excising the reference to the prior crime. The petitioner in *Cardinale* contends that due process was denied him at his trial because the presumption of his innocence was impaired by this procedure and the jury was severely prejudiced into thinking that he was a "bad man."

Although the instant case arises in a superficially different setting, we think it should be decided with *Cardinale.* To be sure, it is not the Fourteenth, but the Fifth Amendment which is here invoked, together with this Court's supervisory power over criminal procedure in federal courts. See, e.g., *Marshall* v. *United States,* 360 U.S. 310 (1959). But the standards of due process to the defendant in a federal court must be at least as high as those in a state court. See *Chambers* v. *Florida,* 309 U.S. 227, 235-36 (1940). Moreover, as this Court said in *McNabb* v. *United States,* 318 U.S. 332, 340 (1943), mere adherence to minimum requirements of "due process" is not necessarily sufficient to satisfy "civilized standards of procedure and evidence" in the federal courts.

The fundamental defect in the *Cardinale* trial was that the jury was allowed to hear matter which was not only

irrelevant and prejudicial but which cut into the presumption of innocence.

The issue here is no different. Indeed, in one sense, the instant case presents a more aggravated example of unfairness than *Cardinale.* In *Cardinale,* the petitioner had been convicted of a previous crime. Here the prosecutor's questions suggesting associations with criminals in criminal acts invited the jury to infer that Petitioner had repeatedly committed crimes in the past although he had not been convicted of any crime.

It was pointed out by the dissent in *Spencer* v. *Texas,* 385 U.S. 554, 572-75 (1967), that

> "While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. *Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged.* A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man', without regard to his guilt of of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, '[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury • • • all practicing lawyers know to be unmitigated fiction.'" (Emphasis added.)

In *Michelson* v. *United States, supra,* 335 U.S. 469, 475-76, this Court said,

> "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as *to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.*" (Emphasis added.)

And in *Burgett* v. *Texas,* 389 U.S. 109 (1967), the Chief Justice, concurring, said,

> "Thus, the jury went into its deliberations knowing that the petitioner had been convicted and imprisoned for four prior felonies, although not one had been proven at the trial. To expect that the jury could wipe this from its memory and decide the petitioner's guilt only on the basis of the evidence of assault is to place too much faith in a jury's ability to detach itself from reality."

Suggestions of prior convictions, trouble with the law and association with evil persons are recognized to be relevant—too relevant. It is inevitable that a jury will assume that a defendant who has committed a previous crime is more likely than not to have committed the crime for which he stands trial. See also *Gross* v. *United States,* 394 F.2d 216 (8th Cir. 1968).

We do not deny that disclosure of prior convictions to the jury in the course of cross-examining "character" witnesses may, under appropriate circumstances, be valid. See *Michelson* v. *United States, supra,* 335 U.S. 469; *Spencer* v. *Texas, supra,* 385 U.S. 554. But the opinions in *Spencer* and *Michelson* also recognize the enormous prejudice which results from revelation of prior crimes. The

salient question must be: Is such revelation (and the consequent unavoidable prejudice to the defendant) justified by a legitimate purpose?

Here the questions asked by the prosecutor and the inferences of prior criminality had no legitimate purpose. As shown in the original petition herein (pp. 21-3), the questions suggesting the association of Petitioner with bad men had no rationable bearing on Petitioner's reputation for truthfulness. See *Shimon* v. *United States, supra,* 352 F.2d 449; *People* v. *Marsh,* 50 Cal.2d 732, 745 (1962).

If this Court reverses on the grounds urged in *Cardinale,* it will hold that admission of evidence of prior crimes, serving "no purpose other than to show criminal disposition" (dissent in *Spencer, supra,* p. 574), dilutes the presumption of innocence and deprives the defendant of life or liberty without due process of law. Under the same principle, the repeated suggestion of prior crimes to the jury during cross-examination of "character" witnesses violates the due process clause of the Fifth Amendment, where the plain effect of such suggestions is only to prejudice the jury into believing that defendant is a "bad man" likely to have committed the crime for which he stands trial, and where such suggestions cannot reasonably be said to shed any light on the defendant's reputation for veracity. In addition, in a federal criminal case, because of the long-recognized danger to the presumption of innocence inherent in revelation of past misdeeds to a jury, such episodes should be examined by this Court under its supervisory power.

Conclusion

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted, and that upon rehearing a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

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